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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 38494 BY THOMAS & KAREN)
POWERS)

* * * * *

The Objectors herein to this matter have submitted objections and exceptions to the Proposal for Decision in this matter. The gravamen of this objection is that the Proposal for Decision inaccurately and inappropriately finds unappropriated waters in the months of July and August.

The Department agrees that the present record reveals little, if any unappropriated water in many years during these drier portions of the irrigation season. However, the record also indicates that there are instances in which these Objectors may not use the water for one reason or another. During these times, unappropriated water will in fact be available for Applicant's use. Moreover, while the Department does not bottom its decision upon this matter, the record also indicates that a portion of these Objectors' use may not be valid as against the claims of the Applicants herein. As noted in the Proposal for Decision, this stretch of stream may fit the legislative definition of an "adjudicated stream," and thus the Applicants' increased use after the date of such decree may not have ripened into a water right for the reason stated in said

Proposal. To the extent this is true, there may be waters available in some years in July and August merely as a hydrologic matter.

The Objectors also complain that said Proposal concludes a lack of adverse effect to prior appropriators on certain provisions in a decree evidencing these Objectors' rights to divert waters from a point upstream from Applicants' point of diversion. This is not a necessary basis for such a determination. The Department notes that these objectors customarily and historically have not exercised their right to divert from such upstream point, but have instead diverted waters from the source of supply at a point downstream from these Applicants' proposed point of diversion. Nothing herein should be construed as indicating that these Objectors are not entitled to so divert their water for their historic uses. Even with such a downstream point of diversion, however, there will be some years in which these Applicants will be able to divert waters without injury to these Objectors at least at some times in those years. Applicants' use thus will not inevitably or necessarily capture water otherwise required for downstream use, and thus, these Applicants will not adversely affect the rights of prior appropriators within the meaning of the statute.

WHEREFORE, subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 38494-s76H is hereby granted to Thomas and Karen

Powers to appropriate 250 gallons per minute up to 68.9 acre-feet per year for sprinkler irrigation of 24.8 acres more or less comprised of 9.8 acres in the NE1/4 of Section 6, Township 8 North, Range 20 West; and 15 acres in the SE1/4 of Section 32, Township 9 North, Range 20 West. In no event shall such waters be diverted prior to April 15 of any given year nor subsequent to October 15 of any given year. In addition, there are granted herein 10 gallons per minute up to .2 acre-feet per year for stock-watering purposes throughout the year. The source of supply for the waters provided for herein shall be McCalla Creek, the waters thereof to be diverted at a point in the SW1/4 NE1/4 NE1/4 of Section 6, Township 8 North, Range 20 West, all in Ravalli County. The priority date for this permit shall be November 10, 1981, at 8:00 a.m.

This permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittees to divert or use water to the detriment of any senior appropriator.

B. The Permittees shall not withdraw or cause to be withdrawn waters from the source of supply pursuant to this permit in excess of that quantity reasonably required for the purposes provided for herein. At all times when the water is not necessary for such purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any such liability, even if such damage is the necessary and unavoidable consequence of the exercise of the same.

D. The Permittees shall at all times be subject to the authority and jurisdiction of any water commissioner duly appointed to distribute the waters of the source of supply. The Permittees shall further pay their proportionate share of the cost of such water commissioner, in the same manner and to the same extent as any other water user subject to the authority of such water commissioner.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 17 day of August, 1982.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872

Matt Williams
Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 38494 BY THOMAS & KAREN)	
POWERS)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Missoula, Montana.

STATEMENT OF THE CASE

The present application seeks 250 gallons per minute up to 69.1 acre-feet per year for stock watering purposes and for the irrigation of 24.8 acres more or less. The source of supply is claimed to be McCalla Creek, a tributary of the Bitterroot River.

An objection to the instant application was filed with the Department of Natural Resources and Conservation by C. E. Honea. This objector did not appear either personally or by representative at the hearing in this matter.

An objection to the instant application was also filed with the Department of Natural Resources and Conservation by Dennis and Carol Barbian. These Objectors appeared personally at the hearing in this matter.

The Department of Natural Resources and Conservation was represented at the hearing by David Pengelly, Area Office Field Supervisor for the Department's Missoula Office.

The Hearings Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and proposed Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and over the persons that are party to this matter.

2. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource.

3. The use of the water claimed by the Applicants herein would be of material benefit to themselves.

4. The Applicants intend to use the waters claimed herein to irrigate lands in hay and pasture, and for stock-watering purposes.

5. The Applicants intend to divert the waters from McCalla Creek by means of a pump and pipeline, and to apply the waters to beneficial use by means of a sprinkler system.

6. The Applicants' proposed means of diversion are customary and adequate for their intended purposes, and said means will not result in the waste of the water resource.

7. There are no permits or water reservations that Applicants' proposed use will unreasonably interfere with.

8. There are surplus waters available for Applicants' use throughout the period during which they request to use the waters and in the amounts claimed herein.

9. The water use proposed by the Applicants will not adversely affect the rights of prior appropriators.

10. The amounts of water claimed herein are reasonable estimates of the quantity of water required for Applicant's purposes, and the use thereof will not result in the waste of the water resource.

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and has jurisdiction over the persons that are parties to this matter. See MCA 85-2-301 (1981) et. seq.

2. The Department of Natural Resources and Conservation is mandated to issue a new water use permit if the following conditions or criteria exist.

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

- (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;
- (7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through 5).

3. The use of the water claimed herein for stock watering and the irrigation of hay and pasture is a beneficial use, see MCA 85-2-102(2) (1981), and the amounts of water claimed for the intended purposes are a reasonable estimate of the quantity of water required for such purposes. See generally Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

It will be noted that a certain Decree, No. DV-80-193 by the Fourth Judicial District of the State of Montana purported to decree to the Applicants in this matter certain water rights for the uses claimed herein with a priority date of September 3, 1980. Whatever the force of this Decree as between the parties to that action, such decreed water use cannot detract from the need for the water claimed herein and hence from any characterization of beneficial use. MCA 85-2-301 (1981) provides that "(a)fter July 1, 1973, a person may not appropriate water except as provided in this chapter . . . A right to appropriate water may not be acquired by any other method, including by adverse use, adverse position, prescription, or estoppel. The method prescribed by this

chapter is exclusive." MCA 85-2-302 (1981) goes further to provide, with exceptions not relevant hereto, that "a person may not appropriate water or commence construction of diversion, detail that no prospective appropriator may commence impoundment, withdrawal, or distribution works therefore, except by applying for and receiving a permit from the Department." Thus, by the plain wording of the statute, a person desiring a water right good against the world after July 1 of 1973 must secure a permit from the Department of Natural Resources and Conservation. Notwithstanding the terms of the above-cited Decree, therefore, the Applicants herein are entitled to a permit for the amounts of water claimed herein without reference to such judicially described waters, so that their right to the use of the water resource may be defined as against any and all water users on hydrologically connected sources of supply.

4. The Applicants' proposed means of diversion are reasonable and customary for their intended purposes, and said means will not result in the waste of the water resource. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

5. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource. See Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

6. There are unappropriated waters in the source of supply McCalla Creek in the amounts the Applicants seek and throughout the period during which they seek the use of the water in at least some years.

The issue of unappropriated or surplus waters as framed by the record must be resolved by the competing claims of the Objector Barbians and the Applicants herein. It will be noted that said Objector Barbian's claim through a decreed right, adjudicated in the matter of Downing v. Johnson, Case No. 971, in the Fourth Judicial District of the State of Montana. In 1921, the Legislature enacted an exclusive method of appropriating water on previously adjudicated streams. See RCH 89-829, repelled, 1973. This procedure contemplated a judicial action, whereby all parties to the previous decree were to be made parties to a subsequent decree providing for waters for the new user. The failure to comply with the terms of the Act frustrated any attempt to make an appropriation from an adjudicated source of supply. See Anaconda National Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926). Manson v. South Side Canal Users' Ass'n., 167 Mont. 210, 537 P.2d 325 (1975). These provisions supplemented and superceded certain provisions of the 1901 statutory scheme providing for appropriations from an adjudicated source, which provisions merely detail that new appropriations from such sources fail only against the claims of a subsequent appropriator complying with the terms of the statute in seeking judicial validation of his new appropriation. See Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926).

Applying these statutes to the instant matter, it would appear that much of the Objector Barbian's use is not valid as against the claims of the Applicant herein. That is, it appears

clear by the evidence herein that said objectors have substantially increased their water use since the date of the original decree, and no subsequent decree has validated this enlarged appropriation. This analysis assumes, of course, that McCalla Creek is an adjudicated stream within the terms of these statutory provisions. See generally Stone, Are there any Adjudicated Streams in Montana?, 19 Mont. Law Rev. 19 (1957). It is not necessary to resolve this issue in order to find the existence of unappropriated water, however. In any event, such matters can only be conclusively resolved by the water courts, as this administrative agency has no jurisdiction to finally resolve such matters. See generally, MCA 85-2-216 (1981), MCA 3-7-101 (1981) et. seq.

It appears by the evidence herein that there are usually surplus waters available during spring snow-melt runoff. Thereafter the waters of the source of supply subside to a point where the Objectors Barbican have in the past at times diverted all the waters therein for their respective use. However, by the evidence, there are other times in which said Objectors have no need of the water resource and forego their respective use at least at times. An appropriator in this state has an absolute right to use the waters of any source of supply at such times that they are not needed by prior appropriators. This is not a matter of grace to be frustrated at the whim of prior users. See Quigley v. McIntosh, 88 Mont. 103, 290 P. 266 (193); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940). Thus, even considering the Applicants' junior status, there will be some

C years in which the amounts requested herein will be available for the Applicants' requested use. The Applicants are thus entitled to use such water in the order of their priority.

7. The Applicants' use of the water herein will not adversely affect the rights of prior appropriators. It will be noted in this general regard that it would appear that the Objectors Barbian are, to at least a large extent, in a position to protect their own water use. The Decrees referenced herein appear to provide that said Objectors may divert the waters of McCalla Creek through Little Spring Creek from a point above these Applicants' proposed point of diversion. Thus, these Applicants are not even in a position to disturb the prior use of such waters.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following proposed Order is hereby issued.

C Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 38494-s76H is hereby granted to Thomas and Karen Powers to appropriate 250 gallons per minute up to 68.9 acre-feet per year for sprinkler irrigation of 24.8 acres more or less comprised of 9.8 acres in the NE1/4 of Section 6, Township 8 North, Range 20 West; and 15 acres in the SE1/4 of Section 32, Township 9 North, Range 20 West. In no event shall such waters be diverted prior

to April 15 of any given year nor subsequent to October 15 of any given year. In addition, there are granted herein 10 gallons per minute up to .2 acre-feet per year for stock-watering purposes throughout the year. The source of supply for the waters provided for herein shall be McCalla Creek, the waters thereof to be diverted at a point in the SW1/4 NE1/4 NE1/4 of Section 6, Township 8 North, Range 20 West, all in Ravalli County. The priority date for this permit shall be November 10, 1981, at 8:00 a.m.

This permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittees to divert or use water to the detriment of any senior appropriator.

P. The Permittees shall not withdraw or cause to be withdrawn waters from the source of supply pursuant to this permit in excess of that quantity reasonably required for the purposes provided for herein. At all times when the water is not necessary for such purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

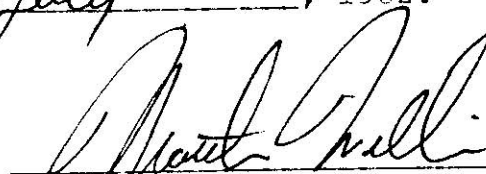
C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any such liability, even if such damage is the necessary and unavoidable consequence of the exercise of the same.

D. The Permittees shall at all times be subject to the authority and jurisdiction of any water commissioner duly appointed to distribute the waters of the source of supply. The Permittees shall further pay their proportionate share of the cost of such water commissioner, in the same manner and to the same extent as any other water user subject to the authority of such water commissioner.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before August 6, 1982.

DONE this 28th day of July, 1982.



Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 29, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Thomas & Karen Powers, Application No. 38494-s76H, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Thomas & Karen Powers, Rt. 2, Box 148, Stevensville, MT 59870
2. C. E. Honea, Rt. 2, Box 141-A, Stevensville, MT 59870
3. Dennis & Carol Barbian, Rt. 2, 712 Willoughby, Stevensville, MT 59870
4. Matt Williams, Hearings Examiner (hand deliver)
5. Dave Pengelly, Missoula Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
by Beverly J. Jones
STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 29th day of July, 1982, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing Recorder, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gahan
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

CASE # 38494